IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
YVONNE KIERIG,	)	**Case No. 99-21016**
	)	
	)	
Debtor.	)	**MEMORANDUM OF DECISION**
	)	**AND ORDER**
	)	
	)	

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

Jeffrey H. Andrews, Couer d'Alene, Idaho, for Debtor.

Ford Elsaesser, Sandpoint, Idaho, chapter 7 Trustee.

BACKGROUND

In February, 1999, the chapter 7 Debtor in this case, Yvonne Kierig ("Debtor") was divorced from her husband, William Kierig ("William"). A Divorce Decree was entered by the state court on February 5, 1999. That Decree, at p. 3, established that the real estate in which the Debtor and William resided was the separate property of William. Because the community might have an interest in the real property by virtue of payments made on underlying debt during the marriage, the state court "equalized" the division of community property as between the Debtor and William by having William assume designated community obligations, pay certain auto insurance and

health insurance expenses of the Debtor, and pay the Debtor $5,000.00. William paid the Debtor $3,000.00 on February 16, 1999 and $2,000.00 on April 13, 1999 in satisfaction of this latter obligation.

In late August, 1999, the Debtor filed her petition for relief. On schedule B she disclosed $3,555.00 in a savings account, along with $33.00 in a checking account. On schedule C, she claimed this $3,588.00 as exempt on the basis that it reflected the proceeds of her homestead. Idaho Code § 55-1008.

The chapter 7 Trustee timely objected to the claim of exemption. Fed.R.Bankr.P. 4003(b). He contends that the Debtor held no ownership interest in the real property and thus doesn't qualify for an exemption under Idaho law. He also argues that the $5,000.00 did not reflect proceeds of sale or transfer of the homestead, but rather merely an adjustment of rights as between the spouses at divorce, and thus these funds can't benefit from any exemption.

This matter came on for hearing on January 11, 2000. Upon the close of evidence and hearing argument, the objection was taken under advisement. This Decision constitutes the Court's findings and conclusions on the contested matter.

DISCUSSION

Debtors before this Court are authorized to claim Idaho statutory exemptions, including the homestead exemption. *In re Koopal*, 226 B.R. 888, 890, 98.4 I.B.C.R. 98, 99 (Bankr. D. Idaho 1998) citing *In re Millsap*, 122 B.R. 577, 579, 91 I.B.C.R. 5, 7 (Bankr. D. Idaho 1991). *See also*, § 522(b); Idaho Code §§ 11-609, 55-1001 through 1011.

Idaho Code § 55-1001(2) provides:

> "Homestead" means and consists of the dwelling house or the mobile home in which the owner resides or intends to reside, with appurtenant buildings, and the land on which the same are situated and by which the same are surrounded, or improved; or unimproved land owned with the intention of placing a house or mobile home thereon and residing thereon. . . . Property included in the homestead must be actually intended or used as a principal home for the owner.

When these conditions are met, the Idaho Code provides for an exemption of up to $50,000 of equity in the property. § 55-1003. The exemption is automatic in the sense that the debtor need not file of record a declaration of homestead in order to gain the benefit of the statute as to property actually occupied as a principal residence. § 55-1004.

Subject to certain provisos not applicable here, § 55-1002 establishes that "[i]f the owner is married, the homestead may consist of the community or jointly owned property of the spouses or the separate property of either spouse."

Finally, § 55-1008 provides in pertinent part that the "proceeds of the voluntary sale of the homestead in good faith for the purpose of acquiring a new homestead" are exempt for one year from their receipt.

It is well established that the homestead exemption statutes are to be liberally construed in favor of the debtor. *Koopal*, 226 B.R. at 890, 98.4 I.B.C.R. at 99; *In re Peters*, 168 B.R. 710, 711, 94 I.B.C.R. 44 (Bankr. D. Idaho 1994); *Millsap*, 122 B.R. at 579, 91 I.B.C.R. at 7. The Trustee bears the burden of proving the exemption is improper. Fed.R.Bankr.P. 4003(c).

Under the Idaho statutes, the Court finds little problem with holding that the Debtor had a cognizable homestead interest in the real property. While the real estate was the separate property of William, and the state court so found, § 55-1002 allows spouses to select their homestead from separate property. There is no evidence to indicate that some other property was selected, nor any to indicate that the spouses did not actually reside on this property. The ownership by at least one spouse and the parties' residency are the only prerequisites under § 55-1001 and § 55-1002. The Trustee has not carried his burden in attacking the genesis of the exemption.

The property was confirmed as William's separate property by the Decree, and he obtained the same free of any claim of the Debtor. But the Decree also manifests an intent to compensate her for the loss of this interest. While the Decree could clearly have been more artfully drafted in regard to this issue, the Court concludes that it reflects a conveyance or equivalent transfer by the Debtor of her community interests in the real property to William in return for $5,000.00 and the other payments noted.[1] She thus benefits – at least initially -- from the exemption on proceeds under § 55-1008 to the extent of the $5,000.00. To hold otherwise would appear to elevate form over substance, and place similarly situated individuals unfairly at risk of

[1] The Debtor testified $300 was paid monthly by the community on the real property debt for 4 years. This totals $14,400, and the Debtor's share of the community interest would be $7,200. Since only $5,000 was paid in cash, $2,200 appears covered by William's assumption of past and future debts under the Decree. The nature of the parties' agreement effectively eliminated the Debtor's ability to claim a § 55-1008 "proceeds" exemption on this $2,200.

dissimilar treatment based solely on the clarity of their divorce lawyers' documents.[2] For this reason, and given the liberal construction of exemption claims, the Court recognizes the Debtor's threshold exemption claim in the $5,000.00 paid to her by William.

This answers, however, only part of the question. The Debtor must evidence an intent to use the proceeds to acquire a replacement homestead, or at least keep the funds identified and segregated in order that such a possibility has not been foreclosed. *In re Mulliken,* 95 I.B.C.R. 73 (Bankr. D. Idaho 1995) states:

> In addition, the Idaho legislature has adopted a rule that allows debtors to sell a homestead and purchase a different homestead and the new homestead will also be protected by the exemption statutes. Idaho Code § 55-1008. However, it is clear from the plain language of Idaho Code § 55-1008 that the proceeds from the voluntary sale of a home may only be claimed exempt if they are held for the "purpose of acquiring a new homestead." If the proceeds are to be used for any other purpose they may not be validly claimed as exempt.

95 I.B.C.R. at 73-74. *See also, Trustee Services Corp. v. Deglopper (In re Deglopper)*, 53 B.R. 95, 96-97, 85 I.B.C.R. 210 (Bankr. D. Idaho 1985) (Debtor lost homestead exemption in proceeds where 60% of proceeds were spent to acquire an automobile and ring, not on new homestead); *Elsaesser v. West One Bank, NA (In re Lares),* 95 I.B.C.R. 264, 267 (Bankr. D. Idaho 1995) (noting that evidence would be required to show debtor held funds for purpose of purchasing another homestead in order to benefit from § 55-1008).

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[2] Each case must, of course, be evaluated on its own particular facts and documents to determine whether a transfer of an interest in a homestead is contemplated or effected.

In this case, $3,000.00 was received on February 16, 1999, and was deposited in the Debtor's savings account. After the $3,000 was deposited, several deposits and withdrawals through March and early April occurred. The Debtor testified that these deposits came from earnings, and the withdrawn funds were used to pay bills.

On April 13, the $2,000.00 received from William was deposited. Thereafter, $1,100 was withdrawn. The Debtor again indicated the funds were used to pay ongoing bills and expenses.

The Debtor made a final deposit of $400.00 from wages in June, 1999. This left a balance of $3,555.09. No further withdrawals or deposits were made before the filing of the petition for relief some ten weeks later.

Intent must be evaluated from all the circumstances. Here the Debtor expressed in her testimony a desire to use what was left in the account for purchase of a new home. She also expressed that intent through her claim of exemption on schedule C.

But *Deglopper* correctly observes that conduct also evidences intent. The funds the Debtor received from William were not segregated and kept identifiable Instead, they were commingled, and invaded on a *seriatim* basis for purposes other than acquiring a replacement homestead. These facts impeach the now declared intent.

It is true that, if the Debtor is given the benefit of all doubt on tracing, only $1,900.00 or about 40% of the proceeds were spent, instead of the 60% in *Deglopper.* But this is a distinction without a difference. Both the Degloppers and

this Debtor failed prior to filing to objectively manifest an intention to utilize the proceeds for the acquisition of an ownership interest in another residence. Subjective declarations notwithstanding, their conduct actually manifested an intent to use the funds for other purposes.

The Court concludes that, under the entirety of the record, the Debtor did not handle and treat the $5,000 in such a manner as to preserve a valid claim of exemption under § 55-1008.

CONCLUSION AND ORDER

In light of the foregoing, the Trustee's objection to the exemption is SUSTAINED, and the claimed exemption is DISALLOWED.

Dated this 10th day of February, 2000.